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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOHNNY JESUS HERNANDEZ, Defendant and Appellant.	A103037 (Sonoma County Super. Ct. No. SCR-30326)

Introduction

Defendant Johnny Jesus Hernandez appeals from the judgment summarily revoking his probation and committing him to state prison for a seven-year term previously imposed. He contends the court erred in denying his request for restoration of custody credits that he had previously waived pursuant to *People v. Johnson* (1978) 82 Cal.App.3d 183 (*Johnson*). He argues that his waiver of custody and conduct credits was neither knowing nor intelligent and that the waiver was coercive and involuntary. Finally, he contends the trial court illegally imposed the aggravated term in violation of *Blakely v. Washington, supra,* ___ U.S. ___ [124 S.Ct. 2531] (*Blakely*). We shall affirm the judgment.

Facts and Procedural Background

On February 8, 2001, the 18-year-old defendant was charged in Sonoma County Superior Court with one felony count of assault by means of force likely to produce

bodily injury. (Pen. Code, § 245, subd. (a)(1).)[1] It was further alleged that defendant had personally inflicted great bodily injury in the commission of the offense (§ 12022.7, subd. (a)), and that the offense was a serious and violent felony (§§ 1192.7, subd. (c)(8); 667.5, subd. (c)(8).)

On May 7, 2001, defendant pleaded guilty to the charge and admitted the enhancements with the understanding that the total sentence would be seven years with execution of sentence stayed and a grant of probation. On June 21, 2001, the court sentenced defendant to the upper term of four years for the offense and three years for the section 12022.7, subdivision (a) great bodily injury enhancement, for a total term of seven years in state prison. The court suspended execution[2] of sentence and placed defendant on probation for three years, conditioned on one year in the county jail. The court awarded defendant credit for time served of 70 days. He was released from county jail on January 21, 2002, after this time was served.

On March 12, 2002, probation was summarily revoked when defendant tested positive for marijuana and methamphetamine, and on March 14, defendant admitted the probation violation. On April 29, 2002, defendant was sentenced nunc pro tunc to seven years in state prison with execution suspended as agreed in the plea bargain, correcting the previous entry in the clerk's transcript. Defendant was reinstated on probation with an additional six months in county jail provided that defendant could be released to the Indian Health Residential Treatment program if and when space became available. Defendant was advised he would have to remain in custody until released to the program and could possibly spend more than one year in county jail. Defendant waived his previously accrued custody credits from March 8, 2002 to April 29, 2002 (the date

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[1] All statutory references are to the Penal Code unless otherwise indicated.

[2] The reporter's transcript indicates that the plea agreement specified that sentence would be imposed and execution suspended. Although the clerk's transcript for the sentencing proceedings reports ambiguously both that defendant was sentenced and that imposition of sentence was suspended, the ambiguity in the clerk's transcript was corrected by the court on April 29, 2002 without objection.

probation was reinstated) and he waived prospective custody credits for any future time in jail and in a residential treatment program. Defendant was released from custody to residential treatment on July 12, 2002, and left residential treatment without authorization four days later.

On July 19, 2002, probation was summarily revoked for the second time, and on September 10, defendant admitted the violation.

On October 25, 2002, over the objection of the district attorney and the probation department, the court indicated that it was going to again reinstate probation and send defendant to Delancey Street for drug treatment. The court urged defendant to take this chance to turn his life around. After this indication, the district attorney requested that if the court reinstated probation, it should request defendant to waive all credits up to that day and while at Delancey Street. The following discussion occurred:

"[DISTRICT ATTORNEY]: Your Honor, if the Court does that and reinstates probation, would the Court consider the People's request that the defendant waive all credits up to today and certainly while in Delancey Street? If the Court does follow this indication, there should be absolutely no credit given to this defendant for any time that he's served previously when he's consistently violated this Court's grants of probation. [¶] If we're here again in six months, I would like very much for the full term of the seven years to be imposed.

"THE COURT: I think that's appropriate so I would request that you waive all credits up to today, all credits while you wait for Delancey to come get you, and all credits while you're in Delancey. And that would mean that if you violate probation and come back, you would be exposed to a full seven-year CDC sentence with no credits. Do you understand what I'm saying?

"THE DEFENDANT: Yes, sir.

"THE COURT: Are you willing to waive all of those credits?

"THE DEFENDANT: Yes, sir.

"THE COURT: All right. *That is not a condition of probation to be waiving them, but the Court has requested that you do it.* All right. [¶] All right. With that, then,

I am going to reinstitute probation, have you remain in custody until Delancey Street picks you up. . . ." (Italics added.)

Whereupon the court extended the total probationary term to five years, sentenced defendant to jail for 90 days, but allowed him to be released early to Delancey Street.

On November 1, 2002, defendant was released from custody to Delancey Street and on December 14, 2002, he left Delancey Street without authorization. Probation was summarily revoked on December 19, 2002. Defendant was arrested in Kansas City, Missouri on March 29, 2003, and on April 22, 2003 he admitted this third violation of probation.

On June 11, 2003, the court committed defendant to state prison for the previously imposed term of seven years. The court imposed a restitution fine of $1,400 and an additional restitution fine of $1,400, which it suspended unless defendant's parole were to be revoked. The court denied defendant's request for restoration of his previously waived custody credits of 706 days—472 actual days and 235 days of conduct credit. Defendant was awarded credit for time served of 111 days, 75 actual and 36 conduct. In refusing to reinstate the custody credits, the court stated: "You also filed a request to have your credits restored to you. You waived those credits as a condition of not being sent to prison previously. The court is not willing to give you your credits back. . . ."

On June 23, 2003, defendant filed a timely notice of appeal.

I.

Defendant contends that his *Johnson* waiver of custody credits was neither knowing nor intelligent, arguing that, in his case, a " 'knowing and intelligent' waiver could only be based on advisement as to the number of custody and conduct credits he had earned as of that date and the statement that if sent to prison he would serve at least that amount in excess of the maximum sentence authorized by statute." Recently, the California Supreme Court has addressed this question, rejecting such a standard.

In *People v. Arnold* (2004) 33 Cal.4th 294 (*Arnold*), the court concluded "that when a defendant knowingly and intelligently waives jail time custody credits after violating probation in order to be reinstated on probation and thereby avoid a prison

sentence, the waiver applies to any future use of such credits should probation ultimately be terminated and a state prison sentence imposed." (*Id.* at p. 298.) In a companion case, *People v. Jeffrey* (2004) 33 Cal.4th 312 (*Jeffrey*), the court held that "a *Johnson* waiver of *future* custody credits to be earned in a residential drug or alcohol treatment facility is a waiver of such credits for all purposes, including application of such credits to a subsequently imposed prison term in the event probation is revoked." (*Jeffrey,* at p. 318.)

With respect to the "knowing and intelligent" waiver required by *Johnson,* the Supreme Court indicated in *Arnold* and *Jeffrey* that the " 'better practice is for sentencing courts to expressly admonish defendants who waive custody credits under *Johnson, supra,* 82 Cal.App.3d 183, that such waivers will apply to any future prison term should probation ultimately be revoked and a state prison sentence imposed. [Citations.] A sentencing court's failure to include such an explicit advisement will not, however, invalidate a *Johnson* waiver by which the defendant is otherwise found to have knowingly and intelligently relinquished his or her right to custody credits under section 2900.5.' (*Arnold, supra,* 33 Cal.4th at p. 309, fn. omitted." (*Jeffrey, supra,* 33 Cal.4th at pp. 318-319.) "A defendant entering a straightforward and unconditional waiver of section 2900.5 credits has no reason to believe that the waiver is anything other than a waiver of such credits for all purposes." (*Arnold,* at p. 309.) When the record does not indicate that at the time defendant entered his *Johnson* waiver, he believed he would be able to recapture the waived custody credits to reduce a possible future prison term, "the waiver of credits must be presumed to be a waiver of credits for all purposes." (*Jeffrey,* at p. 320.)

The record here is not silent, but indicates defendant was explicitly informed by the court that he was being asked to waive "all credits up to today, all credits while you wait for Delancey to come get you, and all credits while you're in Delancey. And that would mean that if you violate probation and come back, you would be exposed to a full seven-year CDC sentence with no credits." A fortiori, we must presume defendant understood he was giving up all credits for all purposes and that his waiver was knowingly and intelligently made.

II.

Defendant next contends that his waiver of credits was coerced and involuntary, relying upon the remarks made by the judge at the October 25, 2002 hearing that defendant's waiver of credits was "not a condition of probation to be waiving them, but the Court has requested that you do it." The court elicited the waiver from defendant at the prosecutor's suggestion, after the court had indicated its intention to reinstate probation with a referral to Delancey Street, but *before* the court actually reinstated probation and ordered that defendant remain in custody until space became available at Delancey Street. Absent this somewhat perplexing statement by the court, we would have no difficulty at all determining that the waiver of credits was part of the bargain wherein probation was reinstated and defendant was allowed to participate in the Delancey Street residential drug treatment program and was not coerced or involuntary.

Defendant contends that on this record the waiver was not a condition of probation. Therefore, there was no bargain or contract negotiated between the court and defendant from which defendant obtained any benefit. Defendant maintains that such a bargain underlies the rationale supporting the refusal to allow recapture of waived credits. He contends that language in the cases, beginning with *People v. Zuniga* (1980) 108 Cal.App.3d 739 (*Zuniga*), supports his analysis. In *Zuniga*, the court rejected the defendant's argument that his *Johnson* waiver of presentence custody credits should apply only to jail time and not to his state prison time, reasoning: "Defendant, in effect, bargained for a probationary sentence by initially waiving the provisions of Penal Code section 2900.5. The court complied and granted defendant the leniency of probation. Defendant now seeks to retract his portion of the bargain on the basis that he now has been removed from probation and sentenced to state prison. His argument appeals to neither logic nor justice. [¶] Probation is a form of leniency which is predicated on the notion that a defendant, by proving his ability to comply with the requirements of the law and certain special conditions imposed upon him, may avoid the more severe sanctions justified by his criminal behavior. Once given the opportunity for lenient treatment the choice is his as to whether he merits being continued on probation. [¶] Here defendant

not only refused to comply with his conditions of probation but committed an additional crime in making his choice. *He cannot use his own misconduct as a basis for setting aside the waiver which he executed as a condition for obtaining leniency in the first instance—in effect a renegotiation of his sentence on his own terms.* [Citation.]" (*Zuniga, supra,* 108 Cal.App.3d at p. 743, italics added; accord, *Arnold, supra,* 33 Cal.4th at p. 303.) *Arnold* quoted *Zuniga* with approval, adding that "[a] rule that gives back previously waived credits to a defendant as a consequence of his future violation of probation thus rewards him for his own misconduct. It is also unjust enrichment, as the defendant would be getting the benefit of the bargain reached at his original sentencing and later be permitted to revoke the consideration he gave up to obtain the benefit of that bargain. As a matter of sound sentencing policy, the law should not afford probationers incentives or rewards for refusing to comply with the terms and conditions of probation." (*Arnold,* at p. 308, fn. omitted.)

The Attorney General argues that, despite the court's comment, the waiver was indeed a condition of probation, pointing out that the waiver was secured from defendant *before* the court actually imposed sentence or made any comment and that neither defendant nor his counsel sought thereafter to clarify whether the probation would actually be granted if the waiver was not secured. We agree that at the time the defendant actually waived the conduct credits, he must have believed that the further grant of probation depended upon this waiver. This view that the probation grant was conditioned upon the waiver is consistent with the court's own recollection of the situation as expressed by the court at the sentencing hearing on June 11, 2003. Moreover, that the *Johnson* waiver was in fact a condition of probation is further supported by the failure of defendant and defense counsel to follow up the court's comment to explore whether probation was indeed premised on the waiver. This silence strongly indicates their belief that the court's comment was gratuitous and that probation and the Delancey Street commitment were dependent upon the waiver.

In the alternative, were we to conclude that the court meant what it said and would have reinstated probation whether or not it secured the credit waiver (a dubious

proposition), we do not conclude that such waiver was therefore coerced or involuntary. Defendant has cited no authority that a defendant may not voluntarily waive conduct credits in such a situation and we have found none. Indeed, to the extent that probation was not conditioned upon the waiver of credits, the defendant was under *less* coercion than otherwise and his waiver could be found entirely voluntary.

Finally, although the cases speak of the "bargain" underlying the waiver of credits, they also acknowledge the *incentive effect* that a waiver of credits has upon the successful completion of probation. As our Supreme Court recognized in *Jeffrey, supra*, 33 Cal.4th 312: "[W]hen probation is conditioned upon completion of a residential treatment program, custody credit waivers ensure the defendant's 'optimum chances of success in [the] treatment program, while reserving an appropriate sentence if, despite the opportunity received, the treatment program and probation are not completed.' " (*Id* at p. 318.) That is precisely the situation presented here. Probation was conditioned upon successful completion of the Delancey Street program, while the court reserved its right to sentence defendant to the full seven years if the program was not completed.

We conclude that defendant's *Johnson* waiver of custody and conduct credits was neither coerced nor involuntary.

III.

While this appeal was pending, defendant obtained leave of this court to file a supplemental brief alleging a sentencing error based on the United States Supreme Court's recent decision in *Blakely, supra,* 124 S.Ct. 2531. Defendant contends the trial court violated *Blakely* when it originally imposed the upper term sentence on the underlying felony assault charge.

In *Blakely,* the Supreme Court held that a Washington State court denied a criminal defendant his constitutional right to a jury trial by increasing the defendant's sentence for second-degree kidnapping from the "standard range" of 49 to 53 months to 90 months based on the trial court's finding that the defendant acted with " 'deliberate cruelty.' " (*Blakely, supra*, 124 S.Ct. at p. 2533.) The *Blakely* court found that the state court violated the rule previously announced in *Apprendi v. New Jersey* (2000) 530 U.S.

466, 490 (*Apprendi*) that, " '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " (*Blakely*, at p. 2536.) In reaching this conclusion, the court clarified that, for *Apprendi* purposes, the " 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely,* at p. 2537.)

Here, on May 7, 2001, during the change of plea proceeding, defendant was told by the prosecutor and he acknowledged his understanding that under the negotiated plea agreement, "you will actually get a seven-year sentence." He was told that execution of sentence would be suspended and that he would be placed on probation for three years, after completing his jail time. "It means that you'll have seven years hanging over your head." Thereafter, the prosecutor reiterated that, the parties had "agreed that it will be seven years execution of sentence suspended with standard terms and conditions." Defendant agreed and voluntarily admitted the felony assault and the enhancements. The court accepted the agreed disposition of "a seven-year execution of sentence suspended . . . with some local jail time" and granted defendant three years' probation. The sentence was based upon an upper term of four years on the felony assault and three years for the enhancement. In sentencing defendant to the four-year upper term on the felony assault, the court found as factors in aggravation that the crime exhibited a high degree of cruelty, that the victim was particularly vulnerable as he was struck and kicked while lying on the ground, that defendant had engaged in violent conduct indicating he was a serious danger to society, that he had "numerous juvenile dependency petitions proceedings" and that his prior performance on juvenile probation was unsatisfactory.

No appeal was taken from this sentence, nor was any issue raised concerning the accuracy of the factors in aggravation listed in the probation report and relied upon by the court.

Following defendant's third violation of probation, the court revoked probation and, on June 11, 2003, committed defendant to the Department of Corrections for the previously suspended term of seven years.

On appeal from the June 11, 2003 revocation of probation and execution of sentence on the previously suspended term, defendant contends that the trial court violated *Blakely* in May 2001, by relying on factors other than the "fact of a prior conviction" itself to impose the aggravated term. (*Blakely, supra,* 124 S.Ct. at p. 2536.)

The People respond that the *Blakely* issue is not cognizable on this appeal. They also contend that *Blakely* does not apply to negotiated dispositions where the defendant admits he was eligible for a specified sentence. We agree *Blakely* is not cognizable on this appeal and do not reach the People's second argument.

In *Blakely, supra,* 124 S.Ct. 2531, the Supreme Court established a new rule for the conduct of criminal prosecutions. That rule applies retroactively to cases *pending on direct review or not yet final*. (See *Griffith v. Kentucky* (1987) 479 U.S. 314, 328 ["a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past"]; see also *People v. Ashmus* (1991) 54 Cal.3d 932, 991.) Here, the original sentence imposing the upper term and granting probation was final three years before *Blakely* was decided. No appeal was taken from that sentence and it had become final long before *Blakely* was decided.

In *Schriro v. Summerlin* (2004) ___ U.S. ___ [124 S.Ct. 2519] (*Schriro*), a case decided on the same date as *Blakely,* the Supreme Court held that its decision in *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*), applying *Apprendi* to a death sentence imposed under Arizona law, did not apply retroactively to cases already final on direct review. (*Schriro,* at pp. 2521, 2526-2527.) The court rejected the two theories upon which the defendant had relied for retroactive application of the new rule: "first, that it was substantive rather than procedural; and second, that it was a 'watershed' procedural rule entitled to retroactive effect." (*Id*. at p. 2523.)

Schriro concluded that *Ring*'s holding was a "new procedural rule." It analyzed the operation of the retroactivity rule: "When a decision of this Court results in a 'new rule,' that rule applies to all criminal cases still pending on direct review. [(*Griffith v. Kentucky, supra,* 479 U.S. 314, 328.)] As to convictions that are already final, however, the rule applies only in limited circumstances. New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, [citation], as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish [citations]. Such rules apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of "an act that the law does not make criminal" ' or faces a punishment that the law cannot impose upon him. [Citations.] [¶] New rules of procedure, on the other hand, generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence, we give retroactive effect to only a small set of ' "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding.' [Citations.] That a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of an accurate conviction is *seriously* diminished.' [Citation.] This class of rules is extremely narrow, and 'it is unlikely that any . . . "ha[s] yet to emerge." ' [Citations.]" (*Schriro, supra,* 124 S.Ct. at pp. 2522-2523, fn. omitted.)

The *Schriro* court concluded that the holding of *Ring, supra,* 536 U.S. 584—that a jury, and not a sentencing judge sitting without a jury, must find an aggravating circumstance necessary for the death penalty—was not "substantive" as it did not alter the range of conduct or the class of persons the law punished. Rather, the new rule regulated "only the *manner of determining* the defendant's culpability" and was consequently "procedural." (*Schriro, supra,* 124 S.Ct. at pp. 2523-2524.) According to

the court, "Rules that allocate decisionmaking authority in this fashion are prototypical procedural rules . . . . [Citation.]" (*Id.* at p. 2523.)

The Supreme Court also rejected the second theory posited by the defendant, that "*Ring* falls under the retroactivity exception for ' "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding.' [Citations.]" (*Schriro, supra*, 124 S.Ct. at p. 2524.) It framed the relevant question as: "whether judicial factfinding so '*seriously* diminishe[s]' accuracy that there is an ' "impermissibly large risk" ' of punishing conduct the law does not reach. [Citations.]" (*Id.* at p. 2525.) It concluded the evidence was "simply too equivocal to support that conclusion." (*Ibid.*) "The right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the *Sixth Amendment*'s guarantees as we interpret them. But it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart. *Ring* announced new procedural rule that does not apply retroactively to cases already final on direct review." (*Schriro*, at pp. 2526-2527.)

We believe *Schriro* is dispositive on the issue here. Just as *Ring*, applying *Apprendi* to death penalty determinations, announced a new procedural rule inapplicable to cases already final on direct review, so, too, *Blakely*, applying the rule of *Apprendi* to other sentencing determinations, does not apply retroactively here.[3]

Defendant attempts to distinguish *Schriro, supra,* 124 S.Ct. 2519, on the grounds that it did not involve the *Apprendi* requirement that existence of the aggravating factor be proved *beyond a reasonable doubt*, but only the aspect that it be proved to a jury rather than to a judge. (See *Schriro,* at p. 2522, fn. 1["Because Arizona law already

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[3] We are aware, as are counsel, of the recent published opinion of Division One, *People v. Amons* (2005) 125 Cal.App.4th 855, which addresses this issue and reaches a similar conclusion. Because it is not yet final, we do not rely upon that opinion.

required aggravating factors to be proved beyond a reasonable doubt [citation], that aspect of *Apprendi* was not at issue"].) However, defendant makes no effort to explain why the "beyond a reasonable doubt standard" is a "substantive rule" while the jury requirement is only "procedural." Indeed, the reasoning of *Schriro* would seem to refute such a claim. Neither the change in the identity of the decisionmaker nor the standard of proof involved "alters the range of conduct or the class of persons that the law punishes." (*Id.* at p. 2523.) Rather, the rule set forth in *Apprendi* and applied in *Blakely* "regulate[s] only the *manner of determining* the defendant's culpability" and is clearly procedural under such a test. (*Ibid.*)

Relying upon *People v. Price* (2004) 120 Cal.App.4th 224, defendant argues that where the sentence imposed was illegal or unauthorized, the trial court may correct the sentence and that the court here should have done so at the time it revoked probation and executed the sentence. In *People v. Price,* the sentence originally pronounced in connection with the grant of probation was unauthorized as a sentence that "could not lawfully be imposed under any circumstances in the particular case." (*Id.* at p. 243.) The trial court originally had imposed a sentence of an illegal length for an assault count based on an enhancement that had neither been alleged nor proved. (*Ibid.*) Upon revocation of probation, the trial court revoking probation found that the trial court that had originally sentenced the defendant had also erroneously pronounced a four-year midterm sentence for a count of corporal injury on a spouse. The revoking court therefore executed what it believed to be a corrected three-year term. The appellate court found that the proper term for that count, because of the existence of a prior conviction, was in fact four years. (*Id.* at p. 244.) The appellate court found both the sentence originally imposed but suspended and that later executed upon revocation of probation were illegal. It therefore remanded for resentencing. In so doing, the appellate court opined that it was "satisfied that after probation revocation, the trial court probably had the authority to correct an illegal sentence imposed and suspended, if it could divine what the legal sentence would have been. When a trial court revokes probation in a case in which sentence was imposed but execution of that sentence was suspended in preparation

for a grant of a term of probation, the trial court after revocation of probation has no authority to reduce the imposed sentence that it then executes. (*People v. Howard* (1997) 16 Cal.4th 1081, 1084.) However, an illegal sentence may be corrected whenever the error comes to the attention of the trial court or any reviewing court. (*People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6; [citations].) Thus, the trial court after revocation, although bound to impose a legal sentence, retained the right to correct an illegal sentence . . . . [Citations.]" (*People v. Price,* at pp. 244-245.)

People v. Price, supra, 120 Cal.App.4th 224, does not apply to the question here. There, the sentence imposed was illegal both at the time imposed and at the time it was executed. Here, in contrast, the sentence was not "illegal" at the time it was imposed. The question presented here is whether the *Blakely* rule applies retroactively to proceedings that are final and no longer pending on direct review. Having determined the answer to be that it does not, the issue of *Blakely* error is not cognizable on this appeal.

Alternatively, were we to determine that *Blakely* applied to this appeal, on this record we would find any error harmless beyond a reasonable doubt as the court expressly relied upon at least two factors—that defendant had juvenile dependency petitions sustained and that he had been on juvenile probation—which have been determined to be the equivalent of defendant's having suffered a prior conviction. (See *People v. Vu* (2004) 124 Cal.App.4th 1060, 1068-1069.) The fact of a prior juvenile adjudication against a minor may properly be relied upon by the trial court to impose the upper term under *Blakely*, as may the fact that the juvenile was on probation. (*Ibid.*)

The presence of both proper and improper factors under *Blakely* will often make it impossible for us to determine whether the court would have imposed the upper term in the absence of the improper factors. However, on this record, the sentence was a negotiated plea that went beyond simply allowing the court to impose any sentence *up to* the four-year aggravated term for assault. Rather, the negotiated plea *specified* that the court would impose the aggravated term. On this record, we can say beyond a reasonable

doubt that the court would have imposed the same sentence based upon the proper factors alone.

Disposition

The judgment is affirmed.

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Kline, P.J.

We concur:

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Haerle, J.

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Ruvolo, J.